

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 3 of 1991

For Approval and Signature:

Hon'ble MR.JUSTICE S.D.SHAH

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

ZAHIRHUSSEIN SHAIKH & 2 ORS.

Versus

MOHAMMADKHAN IBRAHIMKHAN NAWAB

Appearance:

MR GR SHAIKH for Petitioners

MR RAVI R TRIPATHI for Respondent No. 1

CORAM : MR.JUSTICE S.D.SHAH

Date of decision: 02/07/97

ORAL JUDGEMENT

1. Mr.G.R.Shaikh appears for petitioners and Mr.R.R.Tripathi was appointed as amicus curie by this court to assist the court. This revision application is filed by the original defendants of Reg.C.S.No.448/82 against the concurrent judgment and order passed below Exh.65 which was given by the plaintiff for injunction

during the pendency of the suit interalia claiming that the respondent-defendant is the owner of the property admeasuring 11 ft/11 ft and that towards East of the said road the plaintiff is the tenant. One Gulamhusein Noormiya is the landlord of the premises situated at Mashalchiwad area bearing Nodh No.1990 at Rampura, Surat and on the property which was leased to the plaintiff there was one kundi or cesspool and the defendant has put up some of his luggage in such a manner that the passage of water and the drain water towards the cesspool is affected and therefore the defendant was required to be directed by mandatory interim injunction to remove this luggage and chhapra from over said kundi or cesspool with a direction not to put the same once again during the pendency of the suit. Said application was given on 20.4.88 at exh.65 in the pending suit. Such application was resisted by the defendants by filing reply at Exh.72 and the trial court by judgment and order dated 28.11.89 granted the application and issued mandatory injunction in favour of the plaintiff thereby directing the defendant to remove his material and chhapra put on the cesspool and to remove their hut and any obstruction which may obstruct the drain water to pass to the cesspool. The trial court has found that the plaintiff has established *prima facie* case for grant of mandatory injunction and has based on the report of the Commissioner found that the defendant has in fact put up construction between the open place and the cesspool by putting Iron sheets and wooden planks and by putting up construction of the hut thereon. They have even put the Iron drums and wooden boxes on the cesspool. The trial court has also found that unless such obstruction is removed the plaintiff will not be in a position to enjoy the suit property leased to him and irreparable loss will be caused to him which can not be compensated in terms of money. The court has found that the plaintiff was not even in position to clear his cesspool with the result that the drain water get collected and overflows and it becomes impossible for any individual to live in the room hired by him.

2. Aggrieved by the mandatory direction issued by the trial court in Exh.65 the defendants preferred Civil Misc.Appeal No.119/90 in the court of District Court, Surat and the District Court has after considering the judgment and order of the trial court as well as the panchnama prepared by the Court Commissioner found that the plaintiff has established strong *prima facie* case stronger than the one which is required for prohibitory injunction for grant of mandatory injunction and that unless mandatory injunction as prayed for was granted,

the plaintiff will be put to great hardship and irreparable loss will be caused which can not be compensated in terms of money. The trial court has discussed all the aspects of the matter at length and has placed reliance upon the panchnama prepared by the Court commissioner and have found that the defendants have actually put their articles and hut on the duct so as to obstruct the passage of the drain water to cesspool which would normally overflow because of obstruction and would lead to spread of disease and would in every respect be harmful to the occupants of the building. The court also found that the case was rarest of rare cases where even during the pendency of suit the mandatory injunction is required to be granted, and on such finding the lower appellate court by judgment and order, dated 28.11.1990 dismissed the appeal.

3. Being aggrieved by the said judgment and order of the two courts below the petitioner has preferred this revision application under section 115 C.P.Code.

4. The principles for grant of interim mandatory injunction are by now well settled by the decision of the Apex Court. Even otherwise when both the parties to proceedings are tenants and there is right in favour of plaintiff to discharge drain water to the cesspool and another tenant is affecting his such right so as to lead to overflow of dirty water to the cesspool the life of plaintiff in every respect becomes miserable. Mr.G.R.Shaikh, Ld.advocate for petitioner has vehemently urged before this court that the mandatory injunction of this nature should not be granted. Mr.R.R.Tripathi submitted that in view of the decision of the Apex court in the case of DORAB CAWASJI WARDEN vs COOMI SORAB WARDEN reported in AIR 1990 SC 867 wherein the Apex Court has laid down that in appropriate cases even interim mandatory injunction can be granted and in the present case requirements which are set out by the Apex Court in the aforesaid decision are satisfied and the case is fully covered by the said decision. The submission of Mr.Shaikh therefore has no merit or substance and an attempt is made by Mr.Shaikh before this court to take this court to the evidence in the nature of affidavit-in-reply and through panchnama prepared by the Court Commissioner which is not at all helpful to him because the panchnama prepared by the Court Commissioner fully supports the respondents. In view of the aforesaid and in view of the concurrent findings reached by two courts below and in the light of decision of the Apex Court in the case of Hindustan Aeronautics vs Ajit Prasad reported in 1973 SC 76 when no jurisdictional error is

pointed out to this court no interference of this court is called for and the revision application is liable to be dismissed and the same is hereby dismissed. Rule is discharged. Ad-interim reliefs stands vacated. No costs.

4. This court must record its appreciation for the services rendered by Mr.R.R.Tripathi to the court by appearing as Amicus Curie at the request of this court for and on behalf of respondent-plaintiff.

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